
CANADA / JUDGMENT

Holt v. Holt

2021 BCSC 2635

COURT

Supreme Court of British Columbia

DECIDED

5 October 2021

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2021 BCSC 2635 Holt v. Holt

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Holt v. Holt,

2021 BCSC 2635

Date: 20211005

Docket: E181014

Registry: Vancouver

Between:

Jay Clayton John Holt

Claimant

And

Melissa Jane Holt and JaM Bakery Inc.

Respondents

Before: The Honourable Justice Jackson

by teleconference

Oral Reasons for Judgment

Re Costs and Application for Sale of the Bakery

In Chambers

Counsel for the Claimant via teleconference:

L. Spencer

Counsel for the Respondents via teleconference:

T. Hoover

Place and Date of Hearing:

Vancouver, B.C.

October 1, 2021

Place and Date of Judgment:

Vancouver, B.C.

October 5, 2021

[1] THE COURT: This decision was delivered in the form of Oral Reasons. The Reasons have since been edited for publication.

I. Introduction

[2] On June 11, 2021, I issued reasons for judgment indexed as 2021 BCSC 1145 following the trial of this family law case (the "Trial Reasons"). Both parties subsequently presented me with written submissions on the issue of costs.

[3] The claimant also applies for an order that the COBS Bread bakery franchise referred to in the Trial Reasons (the "Bakery") be sold and for an order giving him exclusive conduct of the sale.

II. Positions of the parties

[4] The claimant advances three reasons to support his submission that the respondent should pay his costs:

- a) Success on the primary issues was divided because, he submits, the Bakery must now be sold because the respondent did not deliver the required compensation payment within 60 days of the Trial Reasons as ordered, although on August 11, 2021 she caused \$75,311 to be deposited into her counsel's trust account to hold for the payout of the compensation payment;
- b) The claimant endeavoured to settle the litigation, by presenting various offers and providing case law to support his position, whereas the respondent's conduct during the litigation was less conciliatory; and
- c) A costs order against the claimant will cause hardship and upset the balance created by the trial order, since the respondent will have the benefit of the ongoing business through which she has an earning capacity of approximately \$100,000 per year, whereas the claimant has no assets and a lower earning capacity.

- [5] Alternatively, the claimant asks the court to exercise its discretion to make an award of fixed costs and award the respondent her costs up to the date of trial, and one half of her costs of the trial: *T.A.O. v. D.J.M.*, 2021 BCSC 1724.
- [6] The respondent argues she was the successful party and is entitled to costs, and that she should be awarded double costs from December 2020 through trial on the basis that her settlement proposal of June 30, 2020 ought reasonably to have been accepted by the claimant by that time. She submits that she is ready and able to deliver the compensation payment and advises the delay in doing so was the result of delay in determining the "AUTO" amount, as referred to in the Trial Reasons. The AUTO amount needed to be determined in order to ascertain the final compensation payment owing. Counsel for the respondent acknowledged at the hearing before me that some of the delay was a function of confusion within her office following some administrative changes there over the summer.

III. Analysis

A. Costs

- [7] The statutory provisions governing the sale of costs are found in R. 16-1 and Appendix B of the Supreme Court Family Rules, B.C. Reg. 169/2009 ("SCRF"). Costs can be ordered for a family law case as a whole, or for a particular application or step in a family law case: SCFR, R. 16-1(14). Costs of a family law case must be ordered to the "successful party" unless the court orders otherwise: R. 16-1(7). The term "successful party" is interpreted to mean the party who has achieved substantial success at the trial or hearing: *Fotheringham v. Fotheringham*, 2001 BCSC 1321, at paras. 7 and 28; leave to appeal refused, 2002 BCCA 454; *Chinn v. Hanrieder*, 2013 BCCA 413, at paras. 6-7; *H.K. v. W.K.*, 2018 BCSC 1447 [H.K.] at para. 9, citing *S.A.M. v. J.A.M.*, 2017 BCSC 2348, at para. 7. The court's ability to exercise its discretion to "otherwise order" necessitates consideration of the relevant factors, including hardship, earning capacity, the purpose of the award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself: *Gold v. Gold*, [1993] 106 D.L.R. (4th) 452 (B.C.C.A.) at para. 20. The party who asks the court to order otherwise bears the onus to persuade the court it should do so: *H.K.* at para. 7.
- [8] I made the factual finding at trial that the respondent had been the successful party: Trial Reasons at paras. 68-69. The fact that the compensation payment has not yet been tendered, which I will address further in these reasons when I turn to the claimant's application for sale of the Bakery, does not alter my factual finding. The main issues in dispute at trial were the parties' separation date, division of family property, and child support. The property division issue involved the valuation of the Bakery; the determination of whether the claimant's post-separation draws would be deducted from his ownership share of the company; and the method of effecting the division of family property, that is compensation payment or the sale of the franchise. I accepted the respondent's position on all of those issues. Although the claimant argues the separation date was not a significant issue in dispute, I disagree. The claimant withdrew \$40,000 from the Bakery's corporate bank

account. At trial, the claimant argued that withdrawal predated the parties' separation and was, therefore, not family property, to which each had a presumptive one-half interest as a tenant in common. The date of separation had a significant financial consequence in terms of the division of the family property.

- [9] As the successful party at trial, the respondent is entitled to her costs unless there is a basis to order otherwise. I am not persuaded by the claimant's argument that there is a basis to exercise my discretion to order otherwise.
- [10] The respondent's conduct during litigation, in only presenting one offer and not advising the claimant in advance what authorities she sought to rely on at trial (which I note ended up being the same authorities the claimant had relied on) does not amount to conduct that in my view ought to deprive her of her costs in the litigation.
- [11] Similarly, I am not persuaded an award of costs in favour of the respondent would cause hardship to the claimant. The facts in this case are distinguishable from those in *B.R.T. v. J.L.T.T.*, 2011 BCSC 440, the case relied on by the claimant. In the case before me, there is no evidence the claimant is facing financial hardship; indeed, he has received in excess of \$215,000 from the Bakery since the date of the parties' separation and has had the opportunity to invest those funds if he wished to do so. The claimant's earning capacity, about which I have very little evidence, is a function of his education, skills, and initiative. The claimant abandoned his claim for spousal support. I am not prepared to infer financial hardship in all of those circumstances.
- [12] Similarly, I am not persuaded by the respondent's argument that double costs should be ordered from December 20, 2020 through to trial under R. 11-1(5)(b) of the SCFR. In determining whether a double costs order should be made, the court may consider any factor the court considers appropriate, including whether the offer was one that ought reasonably to have been accepted upon receipt or at any later date; the relationship between the offer and the judgment; and the relative financial circumstances of the parties: SCFR, R. 11-1(6). I am not satisfied the respondent's offer was one that ought reasonably to have been accepted, by that date or at all. There were principled differences in the parties' positions that reasonably affected their assessment of each other's offers.
- [13] Accordingly, the respondent is entitled to her costs, which are to be assessed by the Registrar in accordance with Appendix B of the SCFR. When I say "the trial", I am talking about the action.

B. Application to sell the Bakery

- [14] The claimant says that because the respondent did not deliver the compensation payment to him within 60 days, the Bakery must now be sold as ordered in the Trial Reasons. The Bakery's accountant, however, was unable to provide the amounts allocated to the Bakery from May 2017 through to the end of 2018 for the claimant's AUTO expenses until September 20th of 2021 ("\$AUTO"). That is the "\$AUTO" amount which needed to be calculated to know

the final compensation payment. By that time, the respondent had caused \$75,311 (the amount of the compensation payment based on an earlier but incorrect \$AUTO calculation) to be deposited into her lawyer's trust account. I did not anticipate there would be difficulty in obtaining the correct \$AUTO amount, and while I agree with the claimant that the respondent was not as diligent as she could have been in obtaining the calculation, the sale of the Bakery is a disproportionately harsh consequence for such delay, particularly in light of the fact that she has established that the funds are available to make the compensation payment.

- [15] The respondent was given 60 days to deliver the compensation payment because there was some concern that she would not be able to finance the payment. It is now evident that she can.
- [16] Given all the circumstances, in my view the appropriate order is to adjourn the claimant's application generally, on the following conditions:
- a) The respondent is to deliver the compensation payment, which is now known to be \$79,075.09 less \$5,998.59 (\$73,077.40) to the claimant's counsel by no later than 4:00 p.m. on Friday, October 8, 2021; and
 - b) If the respondent fails to deliver the compensation payment (other than because her attempts to do so have been frustrated by the claimant), the claimant has leave to reschedule his application for an order of sale of the Bakery before me at a time that is mutually convenient for the parties, in consultation with Supreme Court Trial Scheduling.
- [17] One final point on costs. Even though the claimant's application is not granted, given the respondent did not act as diligently as she could have in facilitating the determination of the \$AUTO amount, which in turn has delayed delivery of the required compensation payment, I am exercising my discretion to disentitle her to costs of this application. Instead, each party will bear their own costs for the claimant's application for the order of sale of the Bakery.

"Jackson J."

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